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No. 170

In the

Supreme Court of the United States

OCTOBER TERM, 1957

CEPHAS E. SWORD and HOUSTON FIRE AND CASUALTY INSURANCE COMPANY,

Petitioners,

v.

GULF OIL CORPORATION,

Respondent.

PETITIONERS' BRIEF IN REPLY TO BRIEF OF RESPONDENT

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To the Honorable Supreme Court of the United States

1.

OPINIONS OF THE COURT BELOW

The opinion of the Court of Appeals is reported at *251 Fed. 2d 829.*

2.

JURISDICTION

The judgment of the Court of Appeals was entered January 24, 1958. Rehearing was denied on April 17, 1958.

The jurisdiction of this Court is invoked under Article 28, U. S. C., Sec. 1254(1).

SPECIFICATIONS OF ERROR

I.

Whether a Court of Civil Appeals may, in rendering its judgment in a diversity case, apply substantive law which is in direct conflict with the law of the State from which the case was appealed as declared by the Supreme Court of the state?

II.

Whether a Circuit Court of Appeals may affirm the judgment of the trial Court rendering a summary judgment in a case where the evidence raised issues of fact for the jury without denying to petitioner a trial by jury as required by the Seventh Amendment to the Constitution of the United States?

III.

Whether the United States Supreme Court will permit local law as determined by a Circuit Court of Appeals to control over the right of trial by jury as guaranteed by the Seventh Amendment to the Constitution of the United States?

IV.

Whether the Court erred in holding that under the law of Texas that the doctrine of inherently dangerous work does not inure to the benefit of the employee of the contractor?

V.

Whether the Court erred in holding that the trial court was correct in entering its summary judgment for the appellee Gulf Oil Corporation, in this cause?

VI.

Whether the Court erred in granting a motion for summary judgment after the motion for instructed verdict had been overruled by the Court and after the jury had failed to reach a decision. A new trial should have been ordered by the trial court?

VII.

Whether the Court erred in holding that, under the circumstances here involved, that it was not the duty of Gulf Oil Corporation to inspect the work as it progressed to see if they had furnished reasonably safe place to work to their invitee, Sword?

This case is controlled by Federal law and the Circuit Court erred in attempting to apply the law of Texas.

The brief of the Respondent in this case fails to discuss the Federal law that is clearly in point with the fact situation here involved, to-wit, the decision of Judge Hand in

Halecki v. United New York and New Jersey, S. H. P. Ass'n, 251 Fed. 2d 708. In this case, Judge Hand held, in effect, that the duty was upon Gulf, as applied to this case, even though the work was let out to a sub-contractor, to exercise "reasonable care to ascertain the method and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities."

This case standing alone is a complete reply to the numerous contentions urged by the Respondent. This is particularly true since this case must be decided, not under Texas law, as was done by the Fifth Circuit in this case, but *must be decided under the Federal law in order that the rights of the Petitioners under the Seventh Amendment to the Constitution of the United States can be preserved.*

Recent decisions in support of the Petitioners' Contention as set out in our Petition For Writ of Certiorari on this point are *Allen v. Matson Navigation Company, 255 Fed. 2d 273.* In this case, the Court said on Pg. 281:

> "We also note that while that circumstance would not in our opinion alter the result here, yet 'the sufficiency of certain evidence to raise a question of fact for the jury * * * should not be controlled by state law." 5 Moore's Federal Practice, 2d ed., Sec. 38.

In Footnote 11, Pg. 282, the Court cited the following additional cases with this comment:

> 11. Pogue v. Great Atlantic & Pacific Tea Co., 5 Cir., 242 Fed. 2d 575, 582: 'The kind of jury trial to

which the parties are entitled in Federal Courts under Rules 38 and 39 of the Federal Rules of Civil Procedure, 28 U.S.C.A., is that preserved by the Seventh Amendment to the Constitution, to which the doctrine of Erie Railroad Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, is of course subservient.' Wright v. Paramount-Richards Theatres, 5 Cir., 198 Fed. 2d 303, 305; Reuter v. Eastern Air Lines, 5 Cir., 226 Fed. 2d 443, 445; Reynolds v. Pegler, 2 Cir., 223 Fed. 2d 429, 433, 434.

These cases may explain the extent to which the Supreme Court has indicated it is prepared to go in sustaining the sufficiency of the evidence to support a jury verdict in cases where the inferior federal courts have set verdicts aside. See for example the following, none of which are F. E. L. A. cases: Williams v. Carolina Life Insurance Co., 5 Cir., 210 Fed. 2d 477, reversed at 348 U. S. 802, 75 S. Court. 30, 99 L. Ed. 633; Atlantic Coast Line Railroad Co. v. Swafford, 5 Cir., 220 Fed. 2d 901, reversed at 350 U. S. 807, 76 S. Ct. 80, 100 L. Ed. 725; Eastern Air Lines, Inc. v. Union Trust Co., 95 U. S. App. D. C. 189, 221 Fed. 2d 62, reversed at 350 U. S. 907, 76 S. Ct. 192, 100 L. Ed. 796; Phillips Petroleum Co. v. Gibson, 5 Cir., 232 Fed. 2d 13, reversed at 352 U. S. 874, 77 S. Ct. 16, 1 L. Ed. 2d 77.

It is therefore quite apparent that the Fifth Circuit erred in deciding this case under what they claimed to be the law of Texas and that the Petition For Writ of Certiorari should be granted and the law as determined in the *Halecki* case by the great, distinguished Judge Hand should be applied.

In this connection, however, we would like to point out that the Fifth Circuit has misconstrued Texas decisions relative to the controlling points here involved.

5.

Under Federal law, as well as Texas law, the doctrine of inherently dangerous work does inure to the benefit of the employee of the independent contractor who occupies the status of invitee.

No better statement of the Federal law on this matter can be found than the opinion in American Pacific Whaling Co. v. Kristensen, 93 Fed. 2d 17, in which the Court said:

> "It eliminated entirely the exception to the rule, i.e., that the employer is not relieved from imputation of negligence in cases presenting the principle of 'dangerous instrumentalities.' If the work done by an independent contractor has in it an inherent element of danger, and, through negligence of the contractor, proper provision has not been taken to guard against such danger, such negligence is imputed to the employer. If the work 'from its nature, is likely to cause danger to others, there is a duty on his part to take all reasonable precautions against such danger, and he does not escape from liability for the discharge of that duty by employing the contractor, if the latter does not take these precautions'." Penny v. Wimbledon Urban District (1899) 2 Q.B. 72, 47 Week. Rep. 565. See, also, St. Paul Water Co. v. Ware (1872), 16 Wall. 566, 21 L. Ed. 485; Jacob Doll & Sons, Inc. v. Ribetti (C. C. A. 3, 1913) 203 F. 593; Ohio Southern R. Co. v. Morey (1890) 47 Ohio St. 207, 24 N. E. 269, 7 L. R. A. 701; Richman Bros. Co. v. Miller (1936), 131 Ohio St. 424, 3 N. E. 2d 360; City & Suburban Ry. Co. v. Moores St. Rep. 345.

The Federal law is supported by the great weight of authority throughout America. No stronger statement of the rule can be found than the recent case of *Johnson v. Nicholson, 324 Pac. 2d 307*, in which the Court of Appeals for the

Second District of California on April 16, 1958, on many points squarely in point with the questions involved in this case, held on Pg. 314 as follows:

> "Liability for carelessly handling dangerous instrumentalities arises from failure to use due care, and such failure arises when the *circumstances show* that the actor *had reason to know that his act was likely to produce* injury to any person in the lawful pursuit of his own business and exercising reasonable care. When human life is at stake the rule of due care and diligence requires that without regard to difficulties or expense *every precaution be taken reasonably to assure the safety and security of any person* lawfully coming into the immediate proximity of the dangerous agency or device which is a peril to others. One who causes the use of a dangerous instrument in a negligent manner, or under such circumstances that he has reason to know it is likely to produce injury, is responsible for the natural and probable consequences of his act to any person not at fault."

6.

The cases are in conflict.

The opinion by the Fifth Circuit in *Holt v. Texas-New Mexico Pipeline Co., 145 Fed. 2d 822*, dramatically presents a conflict existing between this case and the cases set out in the Petition For Writ of Certiorari wherein the Court said, speaking through Mr. Justice Holmes, on Pg. 863, as follows:

> "Appellant contends that these facts made out a case for determination by the jury under two well-settled legal principles: (1) That an owner or occupant of premises owes a duty to an invitee to maintain such premises in a reasonably safe condition; and (2) that where one secures the performance of work that is intrinsically dangerous, however skillfully it may be

performed, the one in whose behalf the work is done is charged with the highest degree of care to prevent injury, which duty may not be delegated to another.

"These principles have long been recognized in Texas."

They cite in support of the recognition of these principles of law, under Footnotes 1 and 2, the following cases, among which are several of the cases which Petitioner set forth as representing a conflict which Respondent's counsel has seen fit to attempt to deny and to differentiate:

Footnotes 1 and 2 of the *Holt* decision cites:

"1. Cameron Mill & Elevator Co. v. Anderson, 98 Tex. 156, 81 S. W. 282, 1 L. R. A., N. S., 198; Galveston-Houston Electric Ry. Co. v. Reinle, 113 Tex. 456, 258 S. W. 803; Bustillos v. Southwestern Portland Cement Co., Tex. Comm. App., 211 S. W. 929; Atex Construction Co. v. Farrow, Tex. Civ. App., 71 S. W. 2d 323; El Paso Electric Co. v. Buck, Tex. Civ. App., 143 S. W. 2d 438; Loyd v. Herrington, Tex. Civ. App., 178 S. W. 2d 694, 700; 18 R. C. L. 542; 27 Am. Jur. 517.

"2. Crow v. Continental Oil Co., 5 Cir., 100 F. 2d 292; United Production Co. v. Chesser, 5 Cir., 107 F. 2d 850; Amacker v. Skelly Oil Co., 5 Cir., 132 F. 2d 431; Galveston-Houston Electric Ry. Co. v. Reinle, 113 Tex. 456, 258 S. W. 803; Hozian v. Crucible Steel Casting Co., 132 Ohio St. 453, 9 N. E. 2d 112 A. L. R. 333, and cases cited."

It is quite obvious that the holding in the above cited cases holding that the owner-occupant of premises owes a duty to an invitee, such as Petitioner, to maintain such premises in a reasonably safe condition is in conflict with the holding in this case wherein the Fifth Circuit has held for the first time that this rule of protection for the in-

vitee applies only where the invitor, or employee of the independent contractor, has actual control of the work and then they go further and say that if they do have actual control of the work then there can be no third party suit maintained since the exclusive remedy is under the Workmen's Compensation Act of Texas. If such had been the law in the Federal Courts or in Texas, no recovery could have been had in all of the cases listed above or set out in our Petition For Writ of Certiorari as conflicting with the decision in the case at bar.

It will be observed also that the *Holt* case (which was a suit for an employee of an independent contractor against the Texas-New Mexico Pipeline Co., the owner-occupant) recognizes that the doctrine of intrinsically dangerous work does inure to the benefit of the employee of the independent contractor.

The Fifth Circuit, expressly decided this very point in *Sun Oil Co. v. Kneten, 164 Fed. 2d 806, on Pg. 809*, in a decision in which Mr. Justice Hutcheson participated, when they said:

> "It is also the law in Texas that when the work contracted for is unusually dangerous in itself as the result of circumstances brought about by the owner or employer in the first instance, and injury proximately results from such conditions, the employer is responsible to servants of the independent contractor for such injuries."

It is difficult for counsel to understand how Respondent can say that there is no conflict between these cases as listed in our Petition For Writ of Certiorari and as cited

in the *Holt* case, supra, and this declaration in the *Kneten* case, supra, and the holding of the Court in this case that the doctrine of inherently dangerous work *does not inure, under any circumstances, to the benefit or for the protection of the employee of the independent contractor.*

The Fifth Circuit in *Union Tank & Supply Co. v. Kelley, 167 Fed. 2d 811*, and *Cagle v. McQueen, 200 Fed. 2d 186*, held contra but we will point out in this connection two things. First, they did so because of the decision in *Humble v. Bell, 180 S. W. 2d 979*, and this decision was entitled to no weight at all on any issue save special employee since the Supreme Court expressly held, in writing its opinion as to why the writ was denied, that it was denied was because Bell was a special employee of Humble. *181 S. W. 2d 569.* Secondly, the Federal Courts hold, as in the *Halecki* case, supra, and others herein cited, that the duty rests upon the employer of an independent contractor to make an inspection of the premises and to oversee and supervise the work of the independent contractor in order that he might perform the duty which he owes the invitee of keeping, furnishing and maintaining the place where he is to work reasonably safe. *It is a hollow thing to say that Gulf owes this duty and then say that if they let out a contract to an independent contractor who doesn't perform it that Gulf is not liable.* The decision by Judge Hand in the *Halecki* case and the others cited cannot be reconciled on this point with this decision as to the duty to make an inspection throughout the work from the time of its inception to the time of its completion.

Since this case is controlled *by Federal law*, it is the duty of this Honorable Court to say which of the Federal decisions control. The holding of the Fifth Circuit in this case *practically abolishes third party cases by holding that actual control must exist before duty and that if actual control does exist, there is no cause of action.*

It is quite obvious that this decision is not only in conflict with great weight of authority throughout America, but is in conflict with all previous decisons of the Fifth Circuit. It is further obvious that this *sudden and mysterious change has been made without just cause, explanation or excuse* and that hundreds of thousands of injured workmen and their widows in the years to come will be denied protection *unless* this Honorable Court adopts the stand which it has taken so many times recently and again holds that in a diversity case where the right of trial by jury is involved, that Federal law must control if it collides with local law in view of the requirements of the Seventh Amendment to the Constitution of the United States.

Judge Cardozo once said:

> "The final cause of the law is the welfare of society. The rule that misses its aim cannot permanently justify its existence. * * * If judges have woefully misinterpreted the mores of this day, or if the mores of their day are no longer those of ours, they ought not to tie in helpless submission, the hands of their successors."

These are great, imperishable and durable truths. And they are recalled to mind whenever we read the speeches of appellate judges, caught in the illicit embrace of the 19th

century, who seek to defend their allegiance to no-duty rules and immunity rules by having us believe that it is not they that speak but the iron voice of stare decisis that speaketh in them. This reminds one of the biographer who wrote of Gladstone that his conscience was not only his guide but his accomplice.

7.

Retrial by a new Jury rather than factual re-evaluation by a Court is a constitutional right of genuine value.

The language of Mr. Justice Black in his famous opinion in *Galloway v. United States, 319 U. S. Pg. 400, 87 L. Ed. 1477,* is exactly as above set out. This is Mr. Justice Black's description of the holding in *Slocum v. New York Life Insurance Co., 228 U. S. 364, 57 L. Ed. 879*

In the *Slocum* case, supra, this Court said:

> "In United States v. Wonson, 20 Fed. Case No. 16, 750, a case decided in 1812 and often cited with approval by this Court, it was said by Mr. Justice Story, after quoting the words of the amendment:
>
> > " 'Beyond all question the common law here alluded to is not the common law of any individual state (for it probably differs in all) but it is the common law of England, the grand reservoir of all our jurisprudence.' "

It is difficult, when one studies the background of the Seventh Amendment and its plain, unmistakable language, to understand how any Court has ever held as has the Fifth

Circuit in this case, that in this Federal case, the law of Texas must be applied and must control.

This Honorable Court has done much in the cases hereinbefore discussed, to correct errors of this nature. We believe the views of this Honorable Court, based upon all recent decisions, coincide with the imperishable words of Mr. Justice Black in the *Galloway* case when he said:

> "The call for the true application of the Seventh Amendment is not to words, but to the spirit of honest desire to see that constitutional right preserved. Either the Judge or the Jury must decide facts and to the extent that we take this responsibility, we lessen the jury function. Our duty to preserve this one of the Bill of Rights may be peculiarly difficult, for here it is our own power which we must restrain."

This Court cited with approval the *Galloway* case in the recent *Schulz v. Pennsylvania Railroad Company* decision, *350 U. S. 523, 100 L. Ed. 668, 76 S. Ct. 608.*

Petitioners here ask this Honorable Court to again live up to these two great promises made in the *Galloway* case, supra, to-wit:

> (1) "Trial by Jury is a fundamental guaranty of the rights of the people and Judges should not search the evidence with meticulous care to deprive litigants of Jury trials.
>
> (2) "Since this is a matter of high constitutional importance Appellate Courts should be alert to insure the preservation of this constitutional right even

> though each case necessarily turns on its peculiar circumstances."

In the *Sword* case we are confronted with a situation wherein after the trial court overruled the motion for directed verdict and submitted the case to the Jury, he, upon the failure of the Jury to agree, re-examined the factual situation, in violation of the Seventh Amendment.

The Fifth Circuit indicates, in Footnote 3 of the *Sword* opinion, that there has been some waiver of Petitioner's rights to complain of the Court's entry of a Summary Judgment after the failure of the Jury to agree.

It is elementary that questions going to the Jurisdiction of a Court cannot be waived even though raised for the first time on appeal.

In the *Hurst* case the Respondent claims that all the Fifth Circuit held, with reference to the Charge of the Court, was that it made it *difficult* for the plaintiff to receive a verdict. This is incorrect. On Page 838 of the *Hurst* opinion, the Court said:

> "It submitted the case to the Jury under instructions, however, which, when followed by the Jury, *precluded* a verdict for the plaintiffs."

This is a flat holding by the Fifth Circuit that had there been a case for the Jury that the Court submitted the case in such a way that the plaintiff couldn't win.

We think the Respondent made a mistake in his Brief and failed to notice this ruling of the Court. Apparently,

the basis for their mistake was the subsequent statement by the Court:

> "There were other instructions which made a verdict for the plaintiffs practically impossible."

In fact, the Trial Court, by his own action in the *Sword* case, in withdrawing certain identical portions of the Charge that had been given in the *Hurst* case, expressly admitted that the *Hurst* Charge was fundamentally erroneous. See Pages 190 to 204, R., *Sword* case.

It is quite obvious, therefore, that as to the *Hurst* case, as a matter of judicial fairness, the Respondent should not be permitted to claim that the Court entered a judgment based on a jury verdict, as well as a Summary Judgment, since it is evident that a new trial would have been granted by the Court based on his own admitted erroneous charge, had the Trial Court not re-examined the facts and entered a Summary Judgment in violation of the Seventh Amendment.

Hence, "special and important reasons," call for the granting of the Writ for Certiorari.

For a complete discussion of the controlling law, reference is here made to the reply brief filed by Petitioners in *Glenn Hubbard Hurst v. Gulf Oil Corporation, No. 188*, now pending before this Honorable Court.

CONCLUSION

WHEREFORE, your Petitioners respectfully pray that this Honorable Court grant the Petition For Writ of

Certiorari to the end that on review, the Fifth Circuit Court may be directed to reverse its judgment.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Copies of the foregoing were deposited in the United States mail at Washington, D. C., each in properly stamped envelopes addressed to respective counsel for Respondent, viz.: William L. Kerr and William Monroe Kerr, 211 First National Bank Bldg., P. O. Box 913, Midland, Texas, on this the day of September, 1958.